



Authoritarian Liberalism
as Authoritarian Constitutionalism

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Authoritarian Liberalism as Authoritarian Constitutionalism

Michael A. Wilkinson *

Abstract: Authoritarian liberalism captures the combination of politically authoritarian forms of governing in defence and pursuit of economically liberal ends. It is a phenomenon often associated with periods of economic crisis, such as the recent Euro-crisis. This paper suggests, however, that authoritarian liberalism is less exceptional than normal. This is more generally missed if the constitutional focus is on the relation between democracy and political liberalism rather than between democracy and capitalism. Whilst authoritarian forms of governing are more manifest in the exceptional response to economic crisis, authoritarian liberalism characterises the deep structure of the post-war constitutional settlement in Europe. This was based on a fear of democracy and popular sovereignty, in significant part due to the threat they were perceived to pose to a liberal economic order.

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1. INTRODUCTION

In a series of recent papers, I have tried to capture constitutional developments in Europe as a manifestation of ‘authoritarian liberalism’, when politically authoritarian forms of governing promote programmes (and defend material constellations) of economic liberalism.¹ Similar phenomena have been labelled ‘authoritarian neo-liberalism’, grouping together critical conjunctures in Latin America and Southeast Asia, more generally with imposition of the so-called ‘Washington consensus’, and including the recent Euro-crisis response in the European Union.² In each of these cases, principles of democratic government and social rights are subsumed by logics of capital accumulation, marketization and economic rationality. This occurs not through laissez-faire, but through a strong state apparatus, utilized and in turn enhanced in order to de-regulate markets and privatize public goods, with various shades of coercion - operating between as well as within states and through international institutions. The state (and state-system) is strengthened and democracy is weakened, reinforcing market-based liberal ideas and objectives at the cost of social protection. If, in other words, authoritarianism is understood as a form of governing in opposition to democracy, numerous links between authoritarianism and economic liberalism become apparent.

A. BRIEF HISTORY OF ‘AUTHORITARIAN LIBERALISM’

The confluence of political authoritarianism and economic liberalism in fact has a much longer pedigree.³ Hermann Heller coined the term ‘authoritarian liberalism’ in the interwar period, applying it to the conservative and centrist cabinets advised by Carl Schmitt who pushed programmes of austerity through authoritarian politics in the early 1930s.⁴ Karl Polanyi broadens this narrative, noting how the pattern of heightened authoritarian liberal response and reaction to economic crisis in the interwar period not only hollowed out democracy, but ultimately weakened its ability to respond to the Fascist threat when it arrived.⁵ Polanyi shows further that this dynamic extends back into earlier historical periods, sketching out how the development of the market society across the 19th century is not spontaneous but planned and implemented by authoritarian politics and a strong state apparatus.

¹ Wilkinson, Michael (2013) ‘The Spectre of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union’ 14 *German Law Journal* 527-560; id. (2015) ‘Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?’ 21(3) *European Law Journal* 313-339; id. (2017) ‘The Reconstitution of Postwar Europe: Liberal Excesses, Democratic Deficiencies’ in Michael Dowdle and Michael Wilkinson eds. *Constitutionalism Beyond Liberalism*, Cambridge: Cambridge University Press 38-79.

² Cf. Bruff, Ian (2014) ‘The rise of authoritarian neoliberalism’ 26(1) *Rethinking Marxism* 113-129.

³ See e.g. Cristi, Renato (1998) *Carl Schmitt and Authoritarian Liberalism*, Cardiff: University of Wales Press.

⁴ Heller, Hermann (2015) ‘Authoritarian Liberalism’ 21(3) *European Law Journal* 295-301.

⁵ Polanyi, Karl (2001, first published 1994) *The Great Transformation, The Political and Economic Origins of Our Time*, Boston: Beacon 250-265.

But is authoritarian liberalism properly characterized as a form of *constitutionalism*? There are legitimate doubts. The measures taken in response to the various Euro-crises can and have been described as violating various constitutional norms, both those protected in the European Treaties and in domestic constitutions. The Euro-crisis law might even be described as ‘de-constitutional’ in its bypassing of constitutional checks and balances. De-constitutionalisation is, of course, a type of constitutional change. But if there is an authoritarianism at work, isn’t it in the abrogation of the usual liberal constitutional guarantees? This conclusion would be too quick. It will be argued here, just as Polanyi did in a previous age, that authoritarianism can be identified not only in the emergency response, the suspension of the norm, but also in the norm itself, in the background constitution and constitutional culture of the postwar European settlement, or what I call the ‘material constitution’.⁶ In this sense, de-constitutionalisation is the flip-side of liberal over-constitutionalisation.⁷ Both have clear authoritarian characteristics. In other words, not only the crisis law, but, more fundamentally, the postwar constitutional settlement reflects an authoritarian mindset, a fear of popular sovereignty and democratic constituent power that left it unprepared for dealing with crisis other than through heightened authoritarianism, in a way eerily reminiscent of Polanyi’s earlier diagnosis of the breakdown of interwar liberalism. The various responses, with democratic politics inevitably attempting to strike back, and only capable of doing so concretely at the domestic level, are now frequently denigrated by liberal constitutionalists as ‘populist’. Their solution is to double-down on strategies of authoritarian liberalism.

The paper unfolds as follows. First (part 2) I present a brief account of the elements of the Euro-crisis response that leads to the charge of authoritarian liberalism and suggest this configuration has a longer lineage than commonly supposed. I then speculate (part 3) that this is neglected due to the focus of constitutional theory on political rather than economic liberalism, occluding the conflictual dynamic between democracy and capitalism. I then turn (part 4) to investigate the deeper conjunction between authoritarianism and economic liberalism and consider how this is eclipsed by a postwar focus on the inappositely named ‘militant democracy’. Europe is reconstructed on the basis of a fear of democracy, specifically of its tendency to economic instability or irrationality. This is to be contained by an economic constitutionalism which is already authoritarian in character (part 5). Finally, I conclude by asking whether the doubling-down of liberal constitutionalism on strategies of authoritarian containment may risk provoking more virulent illiberal reactions.

⁶ Goldoni, Marco and Wilkinson, Michael (2018) ‘The Material Constitution’ 81(4) *Modern Law Review* 567-597.

⁷ On over-constitutionalisation, see Grimm, Dieter (2015) ‘Over-Constitutionalisation’ 21(4) *European Law Journal* 460-473.

II. AUTHORITARIAN LIBERALISM IN CRISIS

The term ‘authoritarian liberalism’ captures two specific symptoms of the constitutional development in Europe. First, there is an authoritarian aspect to EU, and especially Eurozone, governance, represented by a process of de-democratisation. This refers to the bypassing of parliamentary authority and parliamentary debate (both domestically and in the EU) as well as the violating or circumventing of the protection of social rights.⁸ This development has been captured by terms such as ‘executive managerialism’, ‘authoritarian managerialism’ and ‘emergency Europe’.⁹

But second, and underemphasised in those accounts, which focus on mutations in the formal exercise of power, is the material nature of this authoritarianism (aiming at the maintenance of a regime of economic liberalism) and its historical pedigree (marking a deepening of rather than diversion from the normal path of integration). These two aspects, material and historical, need to be unpacked in a little more detail.

The material conditions imposed through the Euro-regime, by member states of the Euro-group as well as the ‘Troika’ of institutions (IMF, European Central Bank and European Commission) are neo-liberal ‘austerity’ measures (e.g. privatisation, liberalisation, labour market reforms, regressive tax increases). This demands extraordinary government intervention in society, dismantling social contracts and disrupting existing social relations. It has also been backed by class and country specific injections of central bank liquidity, particularly through the OMT programme, itself tied to conditionality (austerity).¹⁰ Conditionality (hypothetically in the case of the ECB’s bond-buying under OMT) is justified on the basis of the need to return to or approximate ‘market conditions’ of competitive economic practices, in order to avoid the moral hazard of a rescue that might incentivise further government imprudence and avoid or defer neo-liberal structural reform.¹¹

There is in addition a less tangible aspect to the recent conjuncture, the identification of a Schmittian enemy, not external and physical, but internal and *ideological*. According to Donald Tusk, the notion that there could be any alternative

⁸ Kilpatrick, Claire (2015) ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’ 35 *Oxford Journal of Legal Studies* 325–53. Kilpatrick now offers the term ‘liminal legality’, which nicely captures the legal grey area of much of the Eurozone conditionality, see id. (2017) ‘The EU and its Sovereign Debt Programmes: the Challenges of Liminal Legality’ *Current Legal Problems* 337–363.

⁹ See Joerges, Christian (2015) ‘A Crisis of Executive Managerialism in the EU: No Alternative?’ in Trubek, de Búrca, Kilpatrick, and Scott eds. *Critical Legal Perspectives on Global Governance: Liber amicorum David M Trubek*, Oxford: Hart Publishing; White, Jonathan (2015) ‘Emergency Europe’ 63 *Political Studies* 300–18.

¹⁰ See, especially, Blyth, Mark (2013) *Austerity: History of a Dangerous Idea*, Oxford: Oxford University Press.

¹¹ On the OMT programme, see Wilkinson, Michael (2015) ‘The Euro is irreversible, or is it? On OMT, Austerity, and the Threat of ‘Grexit’ 16 *German Law Journal* 1049–1072.

to austerity is a dangerous illusion.¹² Tusk associates resistance to austerity as somehow ‘anti-German’, and speaks approvingly of ordoliberalism as a new ‘common sense’. The notional enemy are those ‘bad Europeans’ who disregard the economic stability criteria.¹³ This is not a constitutional constraint in any formal way. And a domestic electorate may of course accept the idea that ‘there is no alternative’ to neo-liberal or ordoliberal structural reforms. But now that idea is imposed as a material, even supra-constitutional, constraint, ideologically dominant despite the fact that it still seems explicitly *partisan* in a political-economic and a geo-political sense - the crisis has emerged with clear winners and losers, between nations as well as between classes within nations.¹⁴ The fear of anything different, however, leads to impasse, where pressure to remain in the single currency and the EU narrows down the range of constitutional alternatives. These pressures are in a significant way self-imposed; they are constitutional constraints brought to bear by a postwar constitutional settlement that refuses any existential questioning of the project of integration.

A. AUTHORITARIAN LIBERALISM IN EUROPE: NORM RATHER THAN EXCEPTION

Although the austerity measures impose very specific, intrusive, and debilitating constraints on debtor countries, they are, in broader historical perspective, consistent with and *even a continuation of* the liberal economic bias of the underlying European economic constitution. This has evolved unevenly over the last few decades but it affects the EU as a whole, not only the Eurozone; and it affects creditor as well as debtor states.¹⁵ This is an important point because it puts the allegedly exceptional nature of the crisis measures in fuller context. So, although care has to be taken to distinguish particular *institutional* mutations in the governance of economic and monetary union, especially the new powers and authority of the Euro-group and the ECB, it is important to note that the neo-liberal bias of the Euro-crisis response is symptomatic of broader trends in EU economic constitutionalism if not necessarily demanded with any precision in the letter of the Treaty.¹⁶

The hollowing out of social democracy through the Euro-crisis in favour of technocratic market-making and enforced market-rationality is thus a feature of much longer trends. Concerns about the EU’s democratic deficit long predate the financial crisis of 2008; perhaps the most well-known article on the democratic deficit was published in 2006, Hix and Follesdal depicting in meticulous detail the

¹² See ‘The Donald Tusk Interview: Annotated Transcript’, *Financial Times*, July 16, 2015.

¹³ See di Fabio, Udo (2014) ‘Karlsruhe Makes a Referral’ 15 *German Law Journal* 107–110.

¹⁴ Blyth, *Austerity: History of a Dangerous Idea*.

¹⁵ See Scharpf, Fritz (2010) ‘The asymmetry of European Integration, or, why the EU cannot be a social market economy’ 8 *Socio-Economic Review* 211–250.

¹⁶ For an argument that ‘downturn austerity’ is better understood as an ideological prescription rather than a legal obligation within the European constitutional framework, see Kaupa, Clemens (2017) ‘Has Downturn Austerity Really Been Constitutionalised in Europe? On the Ideological Dimension of Such a Claim’ 44 *Journal of Law and Society* 32–55.

centrist free-market bias of the ordinary legislative procedure, and without even any discussion of the constraints imposed as a result of Economic and Monetary Union.¹⁷ In response to German Court's Maastricht ruling, Jürgen Habermas noted in 1995 that the democratic deficit was *already* 'expanding day by day because the economic and social dynamics even within the existing institutional framework perpetuate the erosion of national powers through European law'.¹⁸ In reality, concerns amongst critical and Marxist scholars about the economically liberal bias of European integration and its impact on social democracy can be traced back to before the Single European Act and earlier (even during the so-called *trentes glorieuses*).¹⁹

So although authoritarian rule intensifies through the crisis - as does the degree of popular resistance to the status quo, with the harnessing of 'anti-austerity' social movements, particularly in the Greek case - the logic and dynamic of de-democratisation is identifiable from the beginning of post-war European reconstruction.²⁰ In place of democratic politics, judicial and technocratic authorities took on the role of leading the project of European integration, right from the foundational stages.²¹

The novelty of de-legalisation can also be overstated. Thus the attempt to create a loose structure of public discipline within EMU, the 'Stability and Growth Pact' - setting deficit and debt levels that were violated almost immediately by France and Germany - was under-enforced before the crisis by the European Council and the European Court of Justice.²² This fact was given relatively little attention at the time; in the era of the Open Method of Co-Ordination, soft law, new governance and other softer forms of de-legalisation were *celebrated* by many as sensible departure from a Community method of law-making that was too centralised and 'one-size fits all', unable to accommodate the constitutional diversity within the Union.²³ Social rights have always been approached with caution or even suspicion within the liberal constitutional imagination because the material demands

¹⁷ See Hix, Simon and Andreas Follesdal (2006) 'Why there is a democratic deficit in the EU: A response to Majone and Moravcsik' 44 *JCMS* 533-62.

¹⁸ Habermas, Jürgen (1995) 'Remarks on Dieter Grimm's 'Does Europe Need a Constitution'' 1 *European Law Journal* 303-307.

¹⁹ For an earlier discussion of the link between European integration and capitalist development see Cocks, Peter (1980) 'Towards a Marxist Theory of European Integration' 34(1) *International Organization* 1-40

²⁰ See Wilkinson, 'The Reconstitution of Postwar Europe', above.

²¹ See e.g. Cohen, Antonin (2007) 'Constitutionalism without Constitution: Transnational Elites Between Mobilisation and Legal Expertise in the Making of a Constitution For Europe (1940's-1960's)' 32 *Law and Social Enquiry* 109, and Vauchez, Antoine (2010) 'The Transnational Politics of Judicialisation: *Van Gend en Loos* and the Making of the EU Polity' 16 *European Law Journal* 1. If the crisis now marks a transition from 'integration through law' to 'integration through fear', as Weiler characterised crisis-era Europe, this marks a significant change. See Weiler, Joseph (2012) 'Editorial: Integration Through Fear' 23 *European Journal of International Law* 1-5.

²² Case C-27/04 *Commission v Council*.

²³ For discussion of the relation between new governance, legality and democracy, see Wilkinson, Michael (2010) 'Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism' 2 *Wisconsin Law Review* 672.

they entail. The European Court of Justice, although undoubtedly taking a lead role in the process of constitutionalisation of the EU, has long been accused of failing to take rights seriously, well before the Euro-crisis. As Joseph Weiler long ago put it, if the surface language of the court was fundamental rights, ‘its deep structure was about supremacy’.²⁴

B. A CONSERVATIVE TRANSFORMATION

It is important therefore to grasp that heightened authoritarianism is transformative yet also conservative of the existing constitutional order. To be sure, the Euro-regime can be said to have mutated from a nominally rule-based structure accompanied by market discipline to a discretionary order reinforced by bureaucratic power.²⁵ This is not a temporary suspension of normality, in response to a situation with a clearly demarcated end-point, or with the limits of a sunset clause. It is open-ended and future-oriented. But it has a *conservative aim*. The aim of this mutation, materially, is not to change but *to maintain* the existing material constitution of Europe and its fundamental market-driven telos.

None of this is to say there is nothing new about neo-liberalism, as a specific regime of capital accumulation, for example, so dependent on financialisation of the economy for its resource accumulation and distribution.²⁶ The point is rather to suggest that the connection between authoritarianism and economic liberalism is deeper in the dynamic of constitutional change. The provenance of this conjunction in earlier phases in European history suggests a longer lineage. Far from existing in opposition to authoritarianism, the liberal constitutional imaginary is closely tied to an authoritarian mindset. This is neglected, perhaps, because of the focus in constitutional theory on political rather than economic liberalism.

III. POLITICAL AND ECONOMIC LIBERALISM

If the confluence of authoritarianism and liberalism appears incongruous, this may be because the constitutional imagination is captured by political rather than economic liberalism. During ideological battles of the cold war period, liberalism was twinned with democracy (in Western capitalism), and opposed to authoritarian socialism (in Soviet Communism).²⁷ This was buttressed by the ‘end of history’ thesis famously announced by Fukuyama, liberal democracy presented as the culmination of historical progress, a kind of Hegelian terminus après la lettre. In

²⁴ Weiler, Joseph (1992) ‘The Transformation of Europe’ 100 *Yale Law Journal* 2403, 2483.

²⁵ For a detailed exposition, see Ionnanidis, Michael (2017) ‘Europe’s New Transformations: How the EU Economic Constitution Changed During the Crisis’ 53(5) *Common Market Law Review* 1237–1282.

²⁶ For a useful recent account see e.g. Fine, Ben and Saad-Filho, Alfredo (2017) ‘Thirteen things you need to know about neoliberalism’ 43 *Critical Sociology* 685–706.

²⁷ For discussion, see e.g. Wagner, Peter (2011) ‘The Democratic Crisis of Capitalism: Reflections on Political and Economic Modernity in Europe’ *LEQS Paper No 41/2011*.

political theory, under the influence of Rawls and Habermas, liberalism is paired with democracy and even a certain progressive (in the sense of egalitarian) political-economic outlook.²⁸ Both theorists located their work within the context of a really existing liberal democracy and supported broadly social democratic goals.

A. THE NEGLECT OF CAPITALISM IN LIBERAL CONSTITUTIONAL THEORY

Neither Rawls nor Habermas, however, offers the prospect of any alternative to capitalism as a matter of political economy. Nor do they offer any robust analysis of capitalism as a constitutional problem, in terms of the threat that capitalism poses to the democratic order.²⁹ Radical democrats and critical theorists have thus long criticised Habermasian and Rawlsian political liberalism (and not only Hayek's economic liberalism) for being insufficiently attuned to the question of power, whether it is the significance of cultural power in the struggles for ideological hegemony or the capacity for economic power to translate into or effect political domination.³⁰ Ideological hegemony as well as capitalist interests can threaten to fill the 'empty place of power' on which the autonomy of the political undergirding modern constitutionalism depends.³¹ In this view, liberalism (as well as related traditions of neo-republicanism) neglects the danger of domination arising in, but not limiting itself to, the economic and social sphere.³² It takes for granted the existence of a vibrant democratic culture, underestimates the fragility of democracy and the threats arising to it in a capitalist society - the extent to which individualism, marketisation, competition and the profit motive can and do lead to the erosion of the solidarity and community that democracy needs in order to thrive.³³

Liberal constitutional theorists evade these questions, devoting their attention to the counter-majoritarian dilemma, typically evaluating the legitimacy of

²⁸ Rawls, John (1993) *Political Liberalism*, New York: Columbia University Press; Habermas, Jürgen (1995) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: MIT Press.

²⁹ The earlier Habermas was more attuned to problems of this sort, see eg Habermas, Jürgen (1973) 'What Does a Crisis Mean Today? Legitimation Problems in Late Capitalism' 40(4) *Social Research*.

³⁰ See e.g. Wolin, Sheldon (1996) 'The Liberal/Democratic Divide: On Rawls' Political Liberalism' 24 *Political Theory* 97–119; Mouffe, Chantal (1999) 'Deliberative Democracy or Agonistic Pluralism' 66 *Social Research* 745–758.

³¹ See further, Wilkinson, Michael (2018) 'Public Law and the Autonomy of the Political: A Material Critique', in Wilkinson, Michael and Dowdle, Michael eds. *Questioning the Foundations of Public Law*, Oxford: Hart Publishing.

³² Rawls' own framework (unlike Hayek's version) may be thought to be compatible with social justice or even demand significant redistribution of wealth. But there remains insufficient attention given to the historical record of liberal societies in meeting its egalitarian claims and to the question of whether Rawls's solutions respect his own egalitarian intuitions. See Cohen, Gerry (2008) *Rescuing Justice and Equality*, Cambridge: Harvard University Press.

³³ This threat would have been apparent from earlier work, not only in the European context (see Polanyi, *The Great Transformation, The Political and Economic Origins of Our Time*), but in the US context, earlier pragmatists similarly critiquing the political impact of market liberalism, see e.g. Dewey, John (1927) *The Public and Its Problems*, New York: Henry Holt.

constitutional review of legislation to protect basic civil and political liberties.³⁴ There is less attention to the impact of market freedoms on equal liberties, or to justifications for the decision-making frameworks of political economy (the independence of the central bank, or the legitimacy of constitutionally restricting the micro- and macro-economic policy choices of the government) - even regarding their impact on 'liberal' commitments such as equality of opportunity. Celebration of the metaphorical 'marketplace of ideas' displaces concerns over the actual marketplace of goods, capital, services and persons, and more broadly over the effects of commodification on social relations, short of exploring marginal instances of market immorality, things 'money can't buy'.³⁵ The dynamic of political-economic development is missed because dominant strands of constitutional theory adopt a normativist method of abstract analysis, building on a fictional state of nature in the social contract tradition, a momentary legal system in the tradition of legal positivism or a moralised commitment to the rule of law in the anti-positivist constitutional tradition.³⁶

To be sure, economic liberalism has a more explicitly checkered history in its relationship with democracy. Hayek's distrust not only of social justice, but also of democracy, and his flirting with political authoritarianism, is well documented.³⁷ Identification of the pairing of political authoritarianism and economic liberalism is thus not at all new or unique to the recent Euro-crisis. The notion has been used in the context of Southeast Asian capitalism and Latin America to refer to politically authoritarian and even autocratic and dictatorial measures to implement so called 'free market economics'.³⁸ As indicated in the introduction, this type of pairing is sometimes referred to as 'authoritarian neo-liberalism', capturing the turn from a relatively consensual neo-liberalism of the 'third way' to the more coercive type that resurfaced during the recent financial crises.³⁹

B. THE CONFLICT BETWEEN DEMOCRACY AND CAPITALISM

But there is a more general conceptual point to be made in order to capture the deeper tension between political and economic spheres in a constitutional state which is both democratic and capitalist in form. As a democratic state, modern constitutional authority depends at root on some connection to 'we, the people'.

³⁴ See e.g. Alexander, Larry ed. (1998) *Constitutionalism: Philosophical Foundations*, Cambridge: Cambridge University Press.

³⁵ See Sandel, Michael (2012) *What Money Can't Buy: The Moral Limits of Markets*, London: Allen Lane.

³⁶ Rawls' own later concern (when he moves from the general theory of justice to its more particular expression in *Political Liberalism*) is with the stability of the political conception of justice in the face of the challenge of multiculturalism and the pluralism of comprehensive doctrines rather than in the face of the challenges of capitalism, specifically its structural tendencies towards inequality, on which, see Piketty, Thomas (2013) *Capital in the 21st Century*, Cambridge: Harvard University Press.

³⁷ Cf. Scheuerman, William (1997) 'The Unholy Alliance of Carl Schmitt and Friedrich Hayek' 4 *Constellations* 172.

³⁸ See e.g. Jayasuriya, Kanishka (2001) 'Globalisation, Sovereignty and the Rule of Law: From Political to Economic Constitutionalism' 8 *Constellations* 442.

³⁹ On 'authoritarian neoliberalism' see Bruff, Ian (2014) 'The Rise of Authoritarian Neoliberalism' 26 *Rethinking Marxism* 113–129.

‘The people’ here represents the rhetorical and symbolic force of popular sovereignty, a force capable of acting as a constituent power. This expresses the relative autonomy of the political realm, not only from theological power, as in classic accounts of modern secularisation, but also from economic power. It is not merely a presupposition, or a worldview. It is a fragile and ongoing material dynamic, attained, if at all, by social struggle against the fusion of political and economic power and class rule (which does not end with feudalism). Its narrative includes worker’s movements, women’s movements, anti-colonial movements, and other struggles for equality and recognition.⁴⁰

In a capitalist state, modern constitutional authority requires the relative autonomy of the economic realm. This privatised domain is based on market logic – operating according to imperatives of de-politicisation (naturalisation) of inequality, commodification of social relations, and competitive erosion of the bonds of solidarity. This is not hermetically sealed off from the public realm. Its dysfunctionality affects the legitimacy of the political domain of democracy and, as inequality grows, of the relationship between rulers and ruled.

Liberal constitutional theory, and much constitutional theory more generally, evade this dynamic, taking as givens free market capitalism on the one side and democratic legitimacy on the other. It simply does not provide the tools to deal with the pathologies and contradictions of capitalism and democracy, the tension between public goods and private interests, and the structural inequalities of power embedded in the modern state and state system. These are not free-floating but constituted by and constitutive of legal and political features of the constitutional order.

C. MATERIAL CONFLICT AS A CONSTITUTIONAL MATTER

So it would be a mistake to focus only on the play of ordinary politics, and point to the existence of economically liberal as well as socialist parties as demonstration of a background neutrality, or evidence of a neutral playing field between different visions of political economy to be electorally determined at the ballot box. Ordinary politics operates on the basis of a series of background constitutional forces, a material constitution that incorporates interests and ideas, ranging from the protection of private property to myths around hyperinflation. Constituent power then looks like a material struggle right to the bottom as it were, undertaken through historical battles over constitutional essentials, waged between labour and capital over workers’ rights, women’s rights, anti-colonialism, often occurring beneath the surface of ordinary politics. These struggles are profoundly political, whether it is the constitutional (or international) protection of property in a manner that restricts

⁴⁰ These are struggle for what Cornelius Castoriadis calls ‘effective autonomy’, see Castoriadis, Cornelius (1991) *Philosophy, Politics, Autonomy: Essays in Political Philosophy* tr David Ames, Oxford: Oxford University Press.

the overall amount of taxation, the banning of the communist party as unconstitutional, the protection of the freedom of establishment in a supranational constitutional settlement or the ordoliberal political economy of the Eurozone. Below the ebb and flow of ordinary and even constitutional politics lies a dynamic process of material ordering.⁴¹ This is only concealed if we presuppose a constitutional settlement that is immutable, or one that establishes equal liberties once and for all or according to a single rationality. Material conflict is ongoing *as a basic constitutional matter*.

This perspective points to the changing character of the material constitution, reflecting the transformation of the state from a *feudal* to a *capitalist* and later to an *imperial* organization of political and economic power; and then to postmodern or late modern types of state power that have emerged in the more recent period of informal American empire.⁴² More specifically, through the postwar constitutional settlement and integration of Europe a new material constitution of the democratic capitalist state and regional state-system emerges. We can now turn to consider how this establishes and reinforces authoritarian liberalism as a new form of constitutionalism, in reaction to the interwar breakdown of liberal constitutionalism.

IV. INTERWAR: A MISRECKONING?

In late Weimar Germany, the constitutional state had reached breaking point, the liberal differentiation of the political and the economic established and protected by the Constitution itself threatened.⁴³ The reaction of the governing elite was a combination of authoritarianism and economic liberalism, as identified by Social Democrat and constitutional theorist, Hermann Heller,⁴⁴ targeting with the label not only the centrist Cabinets of Chancellor Brüning that governed Germany before the Nazi party took power, but also the constitutional theorist who had advised them, Carl Schmitt.⁴⁵ Schmitt had recommended a strong state in order to keep the free market economy going, protecting itself against the threat of democratic socialism and other experiments of economic democracy. This recommendation was encapsulated in his address to the industrial association, the *Langnam-Verein*, in 1932,

⁴¹ As Marco Goldoni and I have outlined elsewhere, this includes the striving for political unity, the building of institutions, the dynamic of social relations, and fundamental political objectives. Goldoni and Wilkinson, 'The Material Constitution'.

⁴² See Panitch, Leo and Gindin, Sam (2012) *The Making of Global Capitalism: The Political Economy of American Empire*, London: Verso.

⁴³ The Weimar constitution promised to protect economic liberalism as well as the social state, posing a dilemma well understood by its architect, Hugo Preuss, see Preuss, Hugo 'The Significance of the Democratic Republic for the Idea of Social Justice' in Jacobson, Arthur and Schlink, Bernard eds. (2000) *Weimar: A Jurisprudence of Crisis*, Oakland: University of California Press.

⁴⁴ Heller, 'Authoritarian Liberalism'.

⁴⁵ See Schmitt, Carl (1998) 'Strong State, Sound Economy', reprinted in R Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, Cardiff: University of Wales Press.

‘strong state, free economy’.⁴⁶ Heller used the label authoritarian liberalism pejoratively, attacking it as an opportunistic position, which justified a strong state in order to manage and maintain a liberal market economy and the capitalist interests that sustained it, subsidising large banks and industry with one hand while dismantling social policy with the other.

This pattern of authoritarian liberal reaction was far from unique to late Weimar – right across the globe states tried to maintain the political-economic demands of the Gold Standard, fiercely resisting social democratic programmes, until, eventually but unevenly, they abandoned market liberalism, with, for example, Welfarism in Britain and the New Deal in the US.⁴⁷ According to Karl Polanyi, the more fiercely countries resisted social democracy through authoritarian government in the name of economic liberalism and sound finances, the stronger and fiercer the eventual backlash would be. Authoritarian government hollowed out democracy, ultimately weakening its ability to respond to the Fascist threat when it arrived. It was, in other words, authoritarian liberalism that prepared the ground for Fascism.⁴⁸

Yet the message taken by mainstream constitutional theory in response to this extraordinary breakdown of liberal democracy in Germany (and elsewhere) would be quite different from the one Heller and Polanyi had conveyed. It was not the threat that economic liberalism (and capitalism) posed to democracy that resonated in the liberal constitutional imagination, but the threat that democracy posed to itself. Underlying this was the fear that the democratic constituent power posed to liberalism.

A. MILITANT DEMOCRACY: A WRONGLY LABELLED MISDIAGNOSIS

This misdiagnosis came to prominence through the work of another constitutional theorist of the period, who had emigrated to the US but became closely involved in postwar German reconstruction, Karl Loewenstein. Loewenstein, writing in 1935, thought that liberal democracy needed to be more ‘militant’ in the fight against Fascism (and also against Communism).⁴⁹ The structures of the Weimar republic should have been more flexible in order for it to defend itself, by suspending constitutional rights, banning political parties, and preventing the rise of extremist groups and associations. Loewenstein, describing the opportunism of the Fascist opponents of the constitution, urged liberal democracy to pre-empt them, take the

⁴⁶ Ibid.

⁴⁷ See Polanyi, *The Great Transformation, The Political and Economic Origins of Our Time*.

⁴⁸ It was reaction to the ‘deadlock of the market system’ that precipitated the ‘conjoint disintegration’ of the political and economic system across the globe. Although reactions were similar only in discarding laissez-faire principles, where liberals obstructed social and economic reforms that might involve planning, regulation or control, ‘the victory of fascism was made practically unavoidable’. Rejecting purely local or historical explanations for the situation that gave birth to Fascism, ‘in reality’, Polanyi insists, the part it played was determined by one factor: ‘the condition of the market system’, *ibid*, 250–265.

⁴⁹ See Loewenstein, Karl (1937) ‘Militant Democracy and Fundamental Rights Part 1’ 3 *The American Political Science Review* 417; and *id.* (1935) ‘Autocracy versus Democracy in Contemporary Europe Part 1’ 29 *The American Political Science Review* 571.

fight to its enemies, to ‘fight fire with fire’, echoing Carl Schmitt’s own call for robust defence of the Weimar constitution, by dictate and decree if necessary.⁵⁰

In the aftermath of World War II, mainstream political and constitutional theory thus became preoccupied with liberal constitutional defence, neglecting the sociological examination of the material order that could formally and informally undermine democracy in a capitalist state. The German example of entrenching strong constitutional guarantees became increasingly influential and widespread (however misleading the conventional narrative of the dignified reaction to Nazism).⁵¹ Constitutional lawyers, and those tasked with designing legal and political institutions, were dedicated to the justification of various institutional arrangements – whether domestic, international or supranational – that would constrain majoritarianism, with the rationale (or pretext) of preventing democratic backsliding or avoiding democratic irrationality. Independent technocratic institutions such as constitutional courts, commissions, and central banks, became the norm, and were gradually engrained in the liberal constitutional imagination. European integration was an intrinsic part of this postwar settlement, representing the construction of a militant democracy ‘writ large’.

But, as Jan-Werner Müller has recounted, ‘restrained democracy’ is a more accurate representation of this phenomenon than the inappositely named ‘militant democracy’.⁵² If anything, it was liberalism that was to be militantly protected, albeit in the name of democratic consolidation.⁵³ This militancy was driven by concerns to keep the wheels of economic liberalism revolving rather than to promote strong democracy.⁵⁴

In constitutional enquiry, the focus was on the *dangers* of unfettered democracy, rather than, as Heller and Polanyi had warned, of unfettered capitalism and its tendency towards socio-economic inequality. If, in practice, the excesses of capitalism were tempered in the *trentes glorieuses*, through the building of the welfare state and various forms of corporatism and social democracy, this did not capture the attention of constitutional scholars, lawyers and constitution-builders. The seminal texts of liberal political and constitutional theory were preoccupied with resolving the counter-majoritarian dilemma through various devices of justification for constraints on the democratic will of the majority, both institutionally (through constitutional review) and ideologically (as in the later Rawlsian idea of ‘reasonableness’).⁵⁵ The fragility of the constitution in the absence of constitutional review, and even legal positivism’s relativising of the question of legitimacy, is

⁵⁰ Ibid. 432.

⁵¹ See Hailbronner, Michaela (2015) *Tradition and Transformations: The Rise of German Constitutionalism*, Oxford: Oxford University Press.

⁵² See Müller, Jan-Werner (2011) *Contesting Democracy: Political Ideas in 20th Century Europe*, New Haven: Yale University Press.

⁵³ Ibid.

⁵⁴ See Wilkinson, ‘The Reconstitution of Postwar Europe’, above.

⁵⁵ See Rawls, *Political Liberalism*.

blamed by constitutional theorists and legal philosophers for Weimar's collapse.⁵⁶ Capitalism passes under the radar.

Mainstream constitutional theory thus leads away from any critical engagement with political economy. European integration itself is given relatively little attention by constitutional scholars. The creation of an internal market is viewed, tamely and benignly, as designed only to ensure peace and prosperity for all after half of century of war and destruction rather than a new stage of democratic capitalist development. Its constitutional implications are largely overlooked until the Maastricht Treaty. The underlying authoritarianism of the postwar constitutional imagination is perhaps masked by postwar economic growth. But the deep structure emerging represents a new constitutional self-understanding.

V. ECONOMIC CONSTITUTIONALISM AS AUTHORITARIAN CONSTITUTIONALISM: 'WE ARE (AFRAID OF) THE PEOPLE'

The postwar constitutional imagination in Europe was not characterised by any vision of a vibrant democratic state. It was encapsulated in the story of West German postwar constitutional development: 'we are (afraid of) the people'.⁵⁷ Reaction to this fear of democracy entailed a new vision not only of the governing function (in particular the new technocratic style) but of the governing relationship, the relation between state and society, and specifically of the nature and limits of the right to rule over the economy. In other words, it is a vision of de-democratisation both of the constituent and of the constituted powers, of sovereignty and of government. It lays out a new vision of political society, of the individual as a market participant rather than a political citizen. It is a fear held not only by elites, but by the people, of themselves, captured in the psychosocial assessment of Eric Fromm's *Escape From Freedom*.⁵⁸

A. ORDOLIBERALISM AS AUTHORITARIAN LIBERALISM

As a constitutional vision this was presaged in the work of the ordo-liberals, whose founding meeting in Freiberg coincided with Schmitt's address to the *Langnam-*

⁵⁶ See Fuller, Lon (1958) 'Positivism and Fidelity to Law – A Reply to Professor Hart' 71 *Harvard Law Review* 630; and Müller, *Contesting Democracy: Political Ideas in 20th Century Europe* 129. Cf. Neumann, Franz (2009, first published 1942) *Bebemoth: The Structure and Practice of National Socialism 1933-1944*, Chicago: Ivan R Dee.

⁵⁷ See Möllers, Christoph (2008) 'We are (Afraid of) the People: Constituent Power in German Constitutional Thought', in Loughlin, Martin and Walker, Neil eds. *The Paradox of Constitutionalism*, Oxford: Oxford University Press. The UK may be an exception to this, along with the sustained democracies of the Nordic countries.

⁵⁸ Authoritarianism here thus points towards a politically passive population in contrast to the participative authoritarian regime.

Verein, ‘strong state, sound economy’.⁵⁹ Sharing Schmitt’s vehement anti-communism, obsession with order, distrust of economic democracy, and belief in a strong state, they nevertheless presented unfettered capitalism (and not only democracy) as a challenge to the competition-based market society.⁶⁰ Carl Joachim Friedrich identifies the ideological and constitutional significance of this ‘new liberalism’ as early as 1955, noting how it signals a fundamental re-ordering of the basic ideas underpinning constitutional theory.⁶¹ As Friedrich understood, and as Foucault would later explore in his lectures on neo-liberal governmentality in 1979, the decisive theoretical turn triggered by German ordoliberalism had been to replace constituent power (as popular sovereignty) with individual economic freedom — a freedom to participate in the market — as the legitimating device for the whole constitutional order.⁶² The point is not only to delegate power to technocratic agencies to avoid temporary democratic impulses or irrationalities, but to achieve a basic elision or denial of political freedom.

The new constitutionalism of the ordoliberals reversed the original meaning of the economic constitution, which had meant democratic control of the economy and emancipation of the working class (in the work of Neumann and Sinzheimer).⁶³ Instead, the economic order becomes foundational and insulated *from* democracy. Accompanying this reversal, the constitution itself is presented as sovereign, emblematically in post-war West Germany with the idea of an inviolable ‘eternity clause’ in the *Grundgesetz*. This comes to occlude the notion of democratic constituent power, despite the fact that the *Grundgesetz* was meant to be provisional, to be completed by a full constituent power upon Germany reunification.⁶⁴

For the ordo-liberals, the new economic constitutionalism, based on formal equality, individual economic rights and market competition, was intended to achieve the complete abolition of class as well as national conflicts from the political domain.⁶⁵ The class-conscious struggles of the inter-war period would be repressed in order to secure political and economic *stability*, considered threatened by the democratic forces that the inter-war period had unleashed. The new civil religion for the post-war order would be fiscal prudence, efficiency and market rationality,

⁵⁹ On the link between Schmitt and the ordoliberals, and the significant of both for the Euro, see Bonefeld, Werner (2017) ‘Authoritarian Liberalism: From Schmitt via Ordoliberalism to the Euro’ 43 *Critical Sociology* 747.

⁶⁰ Although it was already Franz Neumann who had identified the threat of organised capitalism to the rule of law in the 1920’s. See Neumann, Franz (1987) ‘On the Preconditions and the Legal Concept of an Economic Constitution’ in Kirchheimer, Otto and Neumann Franz eds. *Social Democracy and the Rule of Law* (Tanner, Lena and Tribe, Keith tr.), Crows Nest: Allen and Unwin. See further, Scheuermann, William ed. (1996) *The Rule of Law Under Siege*, Oakland: University of California Press.

⁶¹ Friedrich, Carl (1955) ‘The Political Thought of Neo-liberalism’ 49 *American Political Science Review* 509.

⁶² Ibid; Foucault, Michel (2008) *The Birth of Biopolitics — Lectures at the College de France 1978–1979*, London: Palgrave MacMillan.

⁶³ See Dukes, Ruth (2014) *The Labour Constitution: The Enduring Idea of Labour Law*, Oxford University Press.

⁶⁴ For discussion, see Chambers, Simone (2004) ‘Democracy, Popular Sovereignty, and Constitutional Legitimacy’ 11 *Constellations* 153–173.

⁶⁵ See Bonn, Ludwig-Erhard-Stiftung (1982) *Standard Texts on Social Market Economy: Two Centuries of Discussion*, Horst Friedrich Wunsche ed. Derek Rutter trans., Stuttgart: Gustav Fischer Verlag ix.

the model of the German economic miracle. Democracy would be restrained not (only) for fear of its violating civil or political rights but out of concern for its impact on economic stability.⁶⁶ The strong constitutional state would protect the market economy, and disarm any democratic (or capitalist) threat to it.

B. THE ASCENDENCY OF THE ECONOMIC CONSTITUTION

Although it was far from straightforwardly applied (in practice softened by the Social Market economy and aspects of corporatism), this reconfiguration of the constitutional imagination would become ideologically ascendant, first in West Germany and then elsewhere, not least through its influence on the process of European constitutionalisation.⁶⁷ These trends become more acute in time and of course extend far beyond the EU.⁶⁸ But with the Treaty of Maastricht, the differentiation between politics and economics is taken to a new stage in the constitution of Economic and Monetary Union (EMU), which also unleashes a wave of domestic constitutional challenges against the EU.

As a matter of political economy, the new stage of EMU must of course be understood in the broader context of neo-liberal economic globalisation of the 1980s, and the turn to financialisation.⁶⁹ This incorporated a loosening of capital controls, with the free movement of capital effectively becoming a fundamental right in the EU. With its commitment to a de-politicised monetary policy based exclusively on price stability; and an independent but limited European Central Bank (ECB) with restricted monetary tools but without the guidance of any supranational economic policy capable of dealing with uneven development, socio-economic heterogeneity, or exogenous fiscal shocks, the Maastricht Treaty attempted to supranationalise *ordo-liberal* principles designed for domestic constitutional consumption.⁷⁰ It would also signal a decisive end to the previous, neofunctional logic that economic integration would eventually prompt political integration, and that politicisation would then force elites to engage mass publics in European matters, precipitating a process of Euro-democratisation.⁷¹ On the contrary, it removed an important lever of power from the political pillars of the Member States, but without reconstructing it at the supranational political level or

⁶⁶ See Müller, Jan-Werner (2012) *Contesting Democracy: Political Ideas in Twentieth Century Thought*, New Jersey: Princeton University Press.

⁶⁷ See, e.g., Mestmäcker, Ernst-Joachim (2007) 'European Touchstones of Dominion and Law' *The Ordo Yearbook of Economic and Social Order* 4. Cf. Wigger, Angela (2017) 'Debunking the Myth of the Ordoliberal Influence on Postwar European Integration' in Hien, Joseph and Joerges, Christian eds. *Ordoliberalism, Law and the Rule of Economics*, Oxford: Hart Publishing.

⁶⁸ See Jayasuriya, 'Globalisation, Sovereignty and the Rule of Law: From Political to Economic Constitutionalism'.

⁶⁹ See e.g. Menendez, Agustín (2013) 'The Existential Crisis of the European Union' 14 *German Law Journal* 453.

⁷⁰ See Tuori, Kaarlo and Tuori, Klaus (2012) *The Eurocrisis: A Constitutional Analysis*, Cambridge: Cambridge University Press.

⁷¹ See Marks, Gary and Hooghe Liesbet (2009) 'A Postfunctional Theory of European Integration: From Permissive Consensus to Constraining Dissensus' 39 *British Journal of Political Science* 1, 5.

establishing any plans to do so. And the new currency – a ‘currency without a state’ – was not only democratically unaccountable; it also lacked the social and political bonds of community to sustain it. This suggested a move from economic constitutionalism to what might properly be called a symbol of the ‘economic Messianism’ of the era to follow.⁷² It seemed a decisive victory for capitalism over democracy, just as commentators were proclaiming ‘the end of history’ with the collapse of the Soviet Union. History, however, abruptly returns, when it becomes evident that this structure is ill-designed to deal with economic crisis.

VI. CONCLUSION

The post-war liberal constitutional imagination in Europe, though far from democratic, is more passively than actively authoritarian. It is technocratic, institutional, and juridical in form. In substance it is economically liberal, dedicated to expanding markets, pursuing free trade and spreading economic rationality. Politically, it is moderate, extreme only in the centrism it espouses and the technocratic and managerial ethos it embodies. Democracy is restrained but not yet extinguished.

But this hollowing out of democracy presages the more active authoritarianism to come. Although democracy had never been a key component of the post-war construct, since Maastricht, it would be systematically over-ridden, and not only in parliaments but in popular referenda.⁷³ And when the Euro-crisis hits, liberal centrism struggles to hold, becoming subject to increasing political contestation, sometimes from social movements in the margins but sometimes from positions of governmental power. Having lost faith in normal institutional routes, the apparatus of the state (and European state-system) increasingly resorts to cajoling and coercing, undermining even its own moderate checks and balances of constitutional accountability in an attempt to maintain order.

But the constitutional crisis in Europe is not fundamentally a conflict between emergency politics and the normal rules of the game. These have been relatively easily bent or circumvented when necessary. They are rather surface indicators of a deeper crisis of the material constitution. The ‘rules’ of the economic liberalism established by EMU (ordo-liberal in content) – e.g. no central bank financing, no bail-out of countries in financial difficulty, the avoidance of moral hazard, emphasis on price stability – come into conflict with the imperative to maintain the symbol of integration, the single currency (e.g. the euro is ‘irreversible’, ‘if the Euro fails,

⁷² See Wilkinson, Michael (2014) ‘Economic Messianism and Constitutional Power in a German Europe: All Courts are Equal but Some Courts are More Equal Than Others’ *LSE, Law, Society and Economy Working Papers* 26/2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2522919 (last accessed 19 July 2018).

⁷³ The most conspicuous warning sign was surely the Dutch and French rejection of the EU Constitutional Treaty in 2005, which was followed by its repackaging in the Lisbon Treaty.

Europe fails'). In turn, they both come into conflict with the democratic and social movements against austerity, and in the case of Greece this was pushed (nearly) to the limit with the election of an anti-austerity but pro-European government. There is, in other words, a clash of fundamental constitutional objectives: ordoliberalism, European integration, and democratic self-government.⁷⁴

Considered in the *longue durée* of the battle between economic liberalism and social democracy, Maastricht has been described as having put a decisive end to the European civil war between right and left that took place across the 'short twentieth century'. It signalled the triumph of economic liberalism. The victory of capitalism itself was even declared complete. As Etienne Balibar frames it, reflecting on the (re-) birth of the EU at the Treaty of Maastricht, what is extraordinary is the explicit and detailed setting of its liberal political-economic goals into rigid constitutional guarantees:

'The EU in its constitutive moment (Maastricht) was endowed with a quasi-constitution... where, for the first time in this part of the world... a principle of political economy deriving from a specific ideological discourse (namely neo-liberal deregulation and unrestricted competition, believed to produce 'optimal allocation of resources' and spontaneously 'just' redistribution) was presented as the sovereign rule which all member states ought to implement in their national policies under close surveillance of the federal (or quasi-federal) organs of the Union...'⁷⁵

If the argument of this essay is accepted, however, this battle, or at least its preliminary stages, may have already long ended. Once *politics* is reduced to a single political-economic logic, and the possibility of genuine renewal comes down to the possibility of exercising an original constituent power in a society in which this is greatly feared, the autonomy of the political is reduced to a bare formality or the unlikely prospect of a revolutionary rupture. Constitutionalism has by then already become authoritarian, losing its connection with democratic sovereignty or constituent power. This resettlement occurs right at the beginning of the postwar reconstitution of the European state and the project of European integration, albeit evolving across various stages, and across various varieties of constitutionalism that exist within the EU. It has now reached a critical impasse, as precisely that which the postwar European settlement was meant to restrain begins once again to be unleashed: illiberal movements.

In theory and practice, post-war constituent power is (temporarily) absorbed into a new regime of constituted power, based on constitutional rights, protected by constitutional courts, and managed by other technocratic institutions. But this also signifies a cultural and material shift, captured in the fear of political freedom, so emblematic of the German case but also affecting countries with a limited experience of democratic self-government. Issues of appropriation, distribution and

⁷⁴ See Wilkinson, 'The Euro is Irreversible... Or is it?', note 11 above.

⁷⁵ Balibar, Etienne (2014) 'The Rise and Fall of the European Union: Temporalities and Teleologies' 21(2) *Constellations* 202.

production are increasingly taken out of the public political sphere of contestation, and determined by market logic, or the technocratic bodies who are supposed to replicate it. To capture constitutional change is to capture not only formal channelling but also constitutional framing, the way political debate is to be organised, and what its limits are.⁷⁶ Europe itself has, it seems, now become such a limit.

Since the democratic support for liberal centrism was always thin, it can only compensate in other ways, presenting those who contest it as irrational, unreasonable or un-European. Fear becomes its method in a more overt manner. If its 'success' was apparent in the Greek crisis, its limits may have been revealed through the recent Brexit referendum, which may represent a rupture of the prevailing postwar system. Whether new forms of authoritarian liberalism will be able to sustain it remains to be seen. The doubling down on authoritarian strategies may however only provoke further illiberal response. It seems wise to remember Karl Polanyi's warning that where democracy has been most repressed will be the site of the most virulent reaction.

⁷⁶ As Gavin Anderson puts it, 'constitutional discourse is always more than the rules it generates or legitimates..., setting the parameters not just for how politics is contested, but what is deemed politically contestable'. See Anderson, Gavin (2015) in Gill, Stephen *New Constitutionalism and World Order*, Cambridge: Cambridge University Press 283, quoting Emiliós Christodoulidis.